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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 398.

JOHN C. DOYLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Second Circuit.

MOSES KRISLOV,
566 Hanna Bldg.,
Cleveland, Ohio 44115,

ARTHUR H. CHRISTY,
CARL F. TRUNK, JR.,
30 Rockefeller Plaza,
New York, N. Y. 10020,

Counsel for Appellant Doyle.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-3647

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. ----------.

JOHN C. DOYLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Second Circuit.

Petitioner above-named prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 28, 1965.

CITATIONS AND OPINIONS BELOW.

The opinions and rulings of the United States District Court for the District of Connecticut are unreported.

(a) The District Court's opinion and ruling on Defendants, Sherwood, Berman and Kern's motion to dismiss for delay entered July 25, 1964, is printed at 158(a), *et seq.*[1]

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[1] References are indicated as follows:

To the numbered pages of the Appendix to Defendant's Brief in the Court of Appeals (a).

To the numbered pages of the record on appeal filed pursuant to stipulation of the parties in the Court of Appeals on May 26, 1965 (R.).

To the numbered pages of the Government's brief in the Court of Appeals (Ga).

(b) The District Court's opinion and ruling on Petitioner's motion to dismiss for delay entered August 3, 1964 is printed at 171(a), *et seq.*

(c) The opinion and statements of the District Court on sentencing entered May 3, 1965, is printed at 203(a), *et seq.* The judgment and Commitment of the District Court was filed May 4, 1965, and is printed at 177(a).

The Judgment and the opinion of the United States Court of Appeals for the Second Circuit entered June 28, 1965 is unreported as yet, and is printed in the Appendix hereto (*infra*, p. 46).

JURISDICTION.

The Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Does a defendant, after a trial court has heard and overruled his claims that, due to prosecutive delay the statute of limitations had run, and that he was denied his rights to speedy trial, due process and under F. R. Cr. P. 48(b), waive his such rights by then changing his plea to guilty, unless he expressly reserves his right to raise such questions on appeal.

2. Whether the inordinate delay here (both Pre and Post Indictment), bars the prosecution by virtue of the statute of limitations, the due process clause, the Sixth Amendment, or Rule 48(b) of the Federal Rules of Criminal Procedure.

3. Whether appellant was properly sentenced in view of the fact that the court below considered factually erroneous and irrelevant material furnished by the Government through the probation officer in the secret presentence report.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED.

18 U. S. C. § 3282:

> "Offenses not capital
>
> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

15 U. S. C. § 77e(a)(2):

> "Prohibitions relating to interstate commerce and the mails

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

Rule 6(e), F. R. Cr. P.:

"Secrecy of Proceedings and Disclosure

"(e) * * * The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

Rule 48(b) F. R. Cr. P.:

"Dismissal

"(b) By Court: If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

Amend. V, U. S. Const.:

"Due Process

"No person shall * * * be deprived of life, liberty or property, without due process of law; * * *"

Amend. VI, U. S. Const.:

"Jury Trial for Crimes, and Procedural Rights

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * *"

STATEMENT OF THE CASE.

Petitioner seeks review of affirmance of a judgment imposed upon him on count four of an eleven-count indictment returned under seal at the Government's request on July 2, 1962 (1a, 181a-183a). The indictment—which alleged improper distribution of the common capital stock of Canadian Javelin, Ltd., prior to 1958—remained impounded until August 6, 1963, which the Government requested that it be unsealed (2a, 187a).

After his preliminary motions raising certain points of this appeal were overruled, Petitioner entered a plea of guilty to count four of the indictment, was sentenced by Judge Clarie of the District of Connecticut on May 3, 1965, and appealed to the Second Circuit (30a, 177a, 179a).

Originally joined as defendants and co-conspirators in the indictment were Robert Maurice Sherwood, Milton Berman and Arthur I. Korn. Named as a co-conspirator, but not a defendant, was F. Payson Todd of Boston (33a). The indictment charged all defendants with:

1. Violations of Sec. 17(a), 5(a)(1), and (2), and 17(b) of The Securities Act of 1933, 15 U. S. C. Sec. 77q(a), 77e(a)(1) and (2) and 77q(b); and
2. Conspiracy to violate the same sections and to defraud the United States by impeding the functions of the Securities and Exchange Commission (33a-45a).

On motion of the Government, the court below dismissed count two of the indictment as to all defendants on February 10, 1964 (13a). The remaining counts were dismissed as to defendants Sherwood, Berman and Korn only, on July 25, 1964, upon their motions based upon the delay in making the indictment public (22a, 158a). Petitioner

filed a similar motion claiming that prosecution of the 1957 offenses was barred:

> "By (a) the statute of limitations and the actions of the United States frustrating the statute of limitations, (b) the denial to defendant John Christopher Doyle of due process and speedy trial guaranteed by the Fifth and Sixth Amendments to the United States Constitution, and (c) the denial to defendant John Christopher Doyle of his right to be tried without unnecessary delay upon a charge presented to a Grand Jury without unnecessary delay pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure" (122a-123a).

After hearing the motions on the merits, the trial court found that from July 2, 1962, until August 23, 1962, the indictment "remained sealed for a purpose not directly related to defendant Doyle" (172a), and recognized that petitioner's attorney had no knowledge of the existence of the indictment until April 23, 1963, but denied the motion to dismiss (174a).

Although it was during this July 2-August 23, 1962, period that the five-year limitations period involved in count four expired, the court found that, as to Petitioner, the Government's sealing of the indictment was permissible because of a Government attorney's "understanding that the defendants Sherwood and Berman were outside of the United States" (173a).

After denial on August 3, 1964, of Petitioner's motion to dismiss predicated on the statute of limitations and delay (22a), a preliminary hearing commenced on December 14, 1964 (25a), on his further motion to dismiss on other grounds, and his motion to suppress evidence (R. 19-31; R. 217-219; R. 813-816). Central to the grounds of both of these separate motions was Petitioner's claim (1) that in

1958 a Securities and Exchange Commission official, in arranging for a complex plan for the rehabilitation of Canadian Javelin, Ltd., promised and represented that there would be no criminal prosecution of petitioner or other Javelin officials and (2) that, in reliance upon the promise and representation, Petitioner gave testimony and extensive records to various agencies and instrumentalities of the Government (R. 19-31; R. 217-219; R. 813-816).

The hearing on these motions was continued until February 1, 1965 (28a), at which time the court heard preliminary matters relating to the scope of subpoenae issued by the parties (29a). On February 3, 1965, Petitioner changed his plea to count four, charging him with causing the mailing of 50 shares of Canadian Javelin stock to a New Haven physician (210a), and the Government stated it would move for dismissal of the remaining counts (29a).

On May 3, 1965, Judge Clarie imposed upon Petitioner a three year prison sentence, suspended after three months, probation for one year, and a $5,000 fine (177a), with this observation:

> "Now counsel has well-stated, of course, that we are concerned directly with 50 shares of stock. But, the Probation Officer's report also indicates that this failure to register permitted the sale to many thousands of persons, of several millions of shares—two and a half, I think, millions of shares of stock, without the registration statement having been filed" (204a).

After making this statement the court specifically noted that it gave "regard to all of the information before the Court, and as submitted by the Probation Officer * * *" (205a) before imposing sentence.

Petitioner immediately objected to imposition of sentence on this basis (205a), and in response the court ac-

knowledged that the sentence was predicated upon matters outside the count upon which Petitioner was convicted:

> "The Court: The Court's recollection is that—whether it was more or less, I can't tell you, whether it was one million or a half million. But, it doesn't make any difference. It is not a question of 50 shares of stock alone that the Court has considered" (206a).

Petitioner appealed from the judgment of May 3, 1965 (31a, 179a) but his request for bail pending appeal was denied by Judge Clarie (31a). Because of Judge Clarie's broad basis for imposing sentence and his stated reliance on the pre-sentence report of the probation officer, Petitioner moved to inspect the pre-sentence report so as to be able to refute the improper and erroneous information (209a), but this motion was denied on May 17, 1965 (31a, 213a).[2]

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[2] Petitioner filed an application for reduction of sentence pursuant to Rule 35 on May 12, 1965 (31a). This application was not then pressed because of the effect of the appeal to the Second Circuit on the jurisdiction of the District Court. The motion was overruled on July 15, 1965 when Petitioner, after denials of a stay of mandate pending the filing of this Petition (by both the Second Circuit and Mr. Justice Harlan) failed to appear for surrender in the District Court. He is still at large and a bench warrant has been issued for his arrest. He is in Ottawa, Canada at the time of the writing hereof, and has given every indication that he will not return to the United States. It is anticipated that the Government will argue that certiorari should not be granted for such reason. On balance, it is submitted that the fugitive status of the Petitioner should not influence the consideration of this Court on the question of whether he stands unlawfully convicted.

REASONS FOR GRANTING THE PETITION.

Certiorari should be granted here for the reasons that (a) important questions of Federal Constitutional and Federal Statutory law are raised by this appeal which have not been but should be settled by this Court; (b) the Court of Appeals has made rulings in conflict with decisions of other Appellate Courts; (c) the courts below have departed or so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; (d) elemental considerations of justice and constitutional law require reconsideration of the conviction of petitioner; (e) the record below far fails to substantiate the findings below and presents a situation calling for the exercise of this Court's power of supervision.

I. DEFENDANT IN ORDERLY MANNER RAISED HIS CLAIMS THAT THE PROSECUTION WAS TIME BARRED; THE TRIAL COURT HEARD SUCH MOTIONS AND OVERRULED THEM. DEFENDANT'S SUBSEQUENT PLEA OF GUILTY IS NOT A WAIVER OF SUCH RIGHTS.

Judge Friendly did not reach the merits of the issues relating to whether the prosecution was barred by delay, holding that a plea of guilty waives such issues unless expressly reserved. The thrust of his contention is twofold: First that a plea waives such contentions *simpliciter*; and second that under the facts herein waiver by petitioner was intended.

For authority to support the first contention he relies primarily on *United States v. Parrino*, 203 F. 2d 284, 286-287 (2 Cir. 1953), and *United States v. Cook*, 84 U. S.

(17 Wall.) 168 (1872). These cases are readily distinguishable.[3]

On this posture alone the case raises an important question about the effect of a guilty plea in extinguishing rights—particularly constitutional rights—of the defendant, and upon which this Court has never ruled! Here the questions assertedly barred go not to the merits of the charge, as would a claim of forced confession, but to the Government's right to try the accused. The Court of Appeals implied a waiver of constitutional rights, either by operation of the guilty plea itself or by inference from colloquies between court and counsel that were not directed

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[3] In *Parrino* Defendant was charged with kidnapping. Under the Statute, if the victim was harmed the death penalty applied, eliminating the period of limitations; if the victim was unharmed, there was a time bar which had expired. Upon a plea of guilty, the court found injury i.e. that there was no time bar. Accordingly, since the applicability of the statute of limitations rests upon a fact required to be found on trial by the jury, the plea admits that fact extinguishing the bar of the statute. *Cook,* upon which *L. Hand,* J. relies in *Parrino,* simply does not compel the holding that the statute of limitations can only be raised on trial of the general cause. A simple reading of F. R. Cr. P. 12 (b) (1), would indicate that *Parrino* is limited by its facts, i.e. under the peculiar facts of that case the statute could only be raised on trial of the case. It is, of course, well established that such defenses are properly raised by motion. *United States v. Haramic,* 125 F. Supp. 128 (W. D. Pa. 1954); *United States v. J. L. Hopkins & Co.,* 228 Fed. 173 (S. D. N. Y. 1912); *United States v. Kissel,* 173 Fed. 823 (2 Cir. 1909), rev'd on other grounds, 218 U. S. 601 (1910). Judge Clarie recognized this in passing on the defenses, including the statute of limitations, where he stated: "the criminal statute of limitations of five years, 18 U. S. C. A. § 3282, continued to run" (164a); the use of a sealed indictment could "defeat the statute's intended legislative purpose" (164a); defendants Sherwood, Berman and Korn were prejudiced as a matter of law, "The five-year criminal statute of limitations would have little or no meaning were the law to be construed otherwise" (168a); and "a policy of lying in wait with a sealed indictment, after the criminal statute of limitations has run" (168a-169a) is improper. From the indictment itself and the pre-trial record it appeared with unmistakable clarity that the statute had run, the prosecution against appellant was barred and the District Court had no jurisdiction.

to this issue. Reliance on implied waiver in these circumstances is not in harmony with the decisions of the Supreme Court, e.g. *Henry v. Mississippi*, 379 U. S. 443 (1965), *Fay v. Noia*, 372 U. S. 391, 399 (1963).

In *Fay v. Noia*, 372 U. S. 391, defendant failed to appeal a state conviction and later sought habeas corpus. The Court said, 372 U. S. at 399:

> "(3) failure to appeal cannot under the circumstances be deemed an intelligent and understanding waiver of his right to appeal such as to justify the withholding of federal habeas corpus relief."

In deciding when a waiver occurs the court held that a judge may in his discretion deny relief to an applicant who has *"deliberately by-passed the orderly procedure of the * * * courts * * *"*; and relying on *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938), announced, *"an intentional relinquishment or abandonment of a known right or privilege—furnishes the controlling standard."*

It cannot be gainsaid that petitioner deliberately bypassed orderly procedures or intentionally relinquished or abandoned a known right. The contrary is evident. He in orderly manner fully raised his contentions below, never abandoned them, sought and received rulings thereon, and at the earliest moment and in customary manner sought appellate review from the adverse nature of the rulings.

The rationale of Justice Goldberg in *Escobedo v. Illinois*, 378 U. S. 478 (1964), is equally applicable here; for on principle, there is no distinction between the right here urged and the right there under consideration,—i.e. that the principle of inadvertent waiver of constitutional rights by defendants in criminal cases is rejected by our system. Said Mr. Justice Goldberg (*Escobedo*, 378 U. S. at 490)

"We have learned the companion lesson of history that no system of criminal justice can, or should survive if it comes to depend for it continued effectiveness on the citizen's *abdication through unawareness* of their constitutional rights * * * The accused may of course *intelligently and knowingly waive his privilege* * * * *But no knowing and intelligent waiver of any constitutional right* can be said to have occurred * * *" Emphasis added. See also *Carnly v. Cochran*, 369 U. S. 506 (headnote: waiver must be intelligent and understanding), *Henry v. Mississippi*, 379 U. S. 443 (waiver must be deliberate with intent to waive).

Moreover, Judge Friendly rejects out of hand Petitioner's contention that having preserved his claims as to delay by hearing and ruling below, defendant has sufficiently preserved his status for appeal. He suggests instead that a defendant must either clearly reserve his right to appeal or simply stand on the not guilty plea and put the Government to its proof. Equally tenable is a contention that if the Government wishes a waiver of the right of appeal it should exact it; or that the Government could withhold its motion to dismiss the other counts until the appeal period has run. This aspect of the case thus presents important considerations as to whether the burden is on the defendant to reserve his right to appeal, or on the Government to require express waiver.

It is also plain that the concomitant argument of Judge Friendly that the record discloses an intelligent and intentional waiver, is not tenable. The fact is that there is nothing in the record to so indicate. His entire case on this ground in built on statements extracted from arguments made by Doyle's counsel at the time of sentencing—three months after the plea. The argument of Judge Friendly (App., pp. 54-56) contains no reference to

a waiver of appeal by Petitioner or his counsel. He merely says that the presentation "gave every reason" for a belief that Doyle would not appeal. In sum and substance this argument again merely *infers* waiver.

At the very least, as in *Henry supra* the matter could have been remanded for the taking of evidence and findings as to the "agreement" not to appeal which Judge Friendly finds at the last stages of Part I of his opinion. With a nod in this direction (presumably in recognition of this Court's action in *Henry*) he declines so to do.

Especially in view of the sharp disagreement of counsel for Petitioner (190-191a, 212a, 196a)—who contended that only the count pleaded to could be considered in the sentence—and Government counsel (29-30Ga)—who contended that the dismissed counts should be taken into account—a remand for consideration as to what agreement was reached and whether it was carried out was indicated.[4] Considering the above in the light of the time honored view that a plea of guilty as to certain counts with dismissal of others does not constitute an agreement or deal, examination by this Court is indicated. To reject certiorari here, would thus signal a return to pre *Noia* doctrines of inferential waiver.

Moreover, the decision below is in conflict with that of the Court of Appeals for the Eighth Circuit in *Jaben v. United States*, 333 F. 2d 535 (8th Cir. 1964) *aff'd*, 85 Sup. Ct. 1365 (1965), which said:

"We note initially that the question whether the offense

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[4] Relatedly, F. R. Cr. P. No. 11, which requires that the full consequence of his plea be explained to defendant is ignored in the byplay between counsel. It seems plain that Doyle was at best under a serious misapprehension which plainly affected his decision to plead. His counsel makes this clear by his *presentence* argument.

is barred, a question appropriately raised by the motions to dismiss, is not foreclosed by the plea of nolo contendere. Appellant has the right to appeal from the judgment entered on the plea and to secure an adjudication of the question by this court. Melrose Distillers, Inc. v. United States, 4 Cir., 258 F. 2d, 726, 727 (1958), affirmed, 359 U. S. 271, 79 S. Ct. 763, 3 L. Ed. 2d 800 (1959). Compare also, Lott v. United States, 367 U. S. 421, 81 S. Ct. 1563, 6 L. Ed. 2d 940 (1961)."

The Court below sought to distinguish *Jaben* on the ground that the record there showed that the right to appeal was expressly reserved in the trial court. But there is no mention of this fact either in the Eighth Circuit opinion or in the Supreme Court's affirmance and thus it cannot have been decisive. Nor is there any reason for imposing on the defendant in this case the burden of affirmatively reserving fundamental rights in place of the usual rule requiring affirmative waiver as the Circuit Court decision herein would require.

Nor can the present case be distinguished on the ground that a plea of guilty, and not one of *nolo contendere,* was involved; for a plea of *nolo contendere* "like the plea of guilty * * * is an admission of guilt for the purposes of the case," *Hudson v. United States,* 272 U. S. 451, 455 (1926); *United Brotherhood, etc. v. United States,* 330 U. S. 395, 412 n. 26 (1947), and "has the effect of a plea of guilty," *Zebelman v. United States,* 339 F. 2d 484, 485 (10 Cir. 1964). A plea of guilty also waives only *non-jurisdictional* defects. *United States v. Parker,* 292 F. 2d 2, 3 (6 Cir. 1961); *Marteney v. United States,* 216 F. 2d 760, 762 (10 Cir. 1954). Directly in point in holding that the statute of limitations is couched in "language of extinguishment or prohibition of prosecution" and that when

it has run the trial court is deprived of jurisdiction, is the case of *United States v. Harris*, 133 F. Supp. 796, 799 (W. D. Mo. 1955), *aff'd.*, on other grounds, 237 F. 2d 274 (8 Cir. 1956). In the *Harris* case, Judge Whittaker, later Associate Justice, Supreme Court of the United States, held that the sentence has been imposed there, after plea, "in violation of the laws of the United States, namely Section 3282" *ibid.*, and was therefore subject to collateral attack and void.

In principle, *Harris* is not distinguishable from the present case. In one significant respect, however, this case is much stronger than *Harris*. Here petitioner Doyle seeks review on direct appeal of a point which he raised by timely motion in the court below; in *Harris*, the defendant obtained review on collateral attack of a point he had never raised before. In both cases, however, review is proper because the trial courts were deprived of jurisdiction when the statute of limitations had run. See also *Taylor v. O'Grady*, 113 F. 2d 798, 799 (8 Cir. 1940).

The same rule prevails as to the claims relating to delay based on the Constitution and the criminal rules. In *Shepherd v. United States*, 163 F. 2d 974 (8 Cir. 1947), the court recognized that a claim of denial of the right to a speedy trial is not waived by entry of a guilty plea, when it discussed and disposed of such a claim on its merits in spite of the fact that a guilty plea had been entered before the trial court. The rule in the *Shepherd* case applies with even greater force here, for while the appeal in *Shepherd* was from a denial of a motion to vacate sentence filed more than a year after the plea of guilty, the appeal here is directly from the judgment itself. *See* also *Wood, et al. v. United States*, 128 F. 2d 265, 275 (D. C. Cir. 1942); *Caballero v. Hudspeth*, 36 F. Supp. 905, 906 (D.

Kan. 1941); *Shelton v. United States*, 292 F. 2d 346, 347 (7 Cir. 1961), *cert. denied*, 369 U. S. 877 (1962).[5]

The issue of whether the plea of guilty herein waived the delay contentions urged by Petitioner presents a constitutional question upon which there is conflict between Circuits, and upon which this Court has not ruled. The effect of a plea of guilty as a waiver of already litigated rights (constitutional and statutory) is an important question worthy of consideration and clarification by this Court.

II. THIS PROSECUTION WAS BARRED BY THE STATUTE OF LIMITATIONS, THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, THE SPEEDY TRIAL PROVISION OF THE SIXTH AMENDMENT, AND RULE 48(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

> "The United States of America has sufficient power, prestige, and facilities to openly indict a criminal and bring him to the bar of justice. It is not in keeping with our heritage to destroy that image of America, by a policy of lying in wait with a sealed indictment, after the criminal statute of limitations has run, waiting for an individual defendant to return across its borders" (168a-169a).

These are the words by which Judge Clarie dismissed the indictment as to the three defendants other than Doyle in this case. They apply directly to the sealed in-

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[5] It is recognized that at first blush cases such as *Edwards v. United States*, 256 F. 2d 707 (D. C. Cir. 1958), cert. denied, 358 U. S. 847; *Bloombaum v. United States*, 211 F. 2d 944 (4 Cir. 1954); *Bergen v. United States*, 145 F. 2d 181 (8 Cir. 1944), suggest a contrary result. However, in none of these cases was the entry of the guilty plea preceded by an irreparable denial of the defendant's right to a speedy trial, a motion to dismiss the indictment based on that ground and an express denial of that motion, as was the case here. Those cases therefore are materially distinguishable from this one and not in point.

dictment and long delay in this case. They apply directly to petitioner as well as his co-defendants during the entire period up to April 23, 1963, but they apply with greater impact as to petitioner because there was, at all significant times from July 2, 1962, through, at least, the running of the statute on the only count involved on this appeal, *no* reason for the sealing or continued sealing of the indictment.

The following timetable of significant events places petitioner's contentions in perspective and demonstrates that petitioner could not know, as Judge Clarie said of the co-defendants, that there was, during all of this time, a secret indictment "lurking in undisclosed government files, held in abeyance for a year or years to satisfy the personal motives of a government official" (168a):

> July 25, 1958—The securities of Canadian Javelin, Ltd., were placed on the Securities and Exchange Commission's Canadian Restricted List (52a) —a list composed of companies whose stock the S. E. C. believes is being distributed in the United States in violation of the registration requirements of the Securities Act of 1933.
>
> July-September 1958—Immediately following this S. E. C. action, Javelin retained counsel who had numerous conferences with Edward C. Jaegerman, the S. E. C. chief investigative officer (51a-75a). From these conferences evolved a tentative plan for the protection of Javelin and its stockholders. After much negotiation the plan worked out included, among other things, the following: appellant and other persons connected with Javelin would execute a consent decree in the Southern District of New York, the stock of Javelin would be registered under the Securities and Exchange Act of 1934, Javelin would obtain a listing on the American Stock Exchange, and petitioner and Javelin would submit to

the jurisdiction of the United States. Petitioner and Javelin's counsel understood that in return for compliance with the requirements agreed upon with the S. E. C., neither petitioner nor the officers and directors of Javelin would at a later date be subject to criminal prosecution for any alleged illegal distribution of Javelin stock in the United States prior to July 1958, and that Javelin stock would be removed from the Canadian Restricted List (51a-88a). The Government, while not disputing that there was a plan, does dispute that there was any commitment not to prosecute.

September 23, 1958—The S. E. C. initiated a three-count complaint (S. D. N. Y. No. 138-85) against petitioner, defendant Sherwood and twenty-two others claiming violations of, *inter alia*, 15 U. S. C. § 77e(a) 1, §77q(a) 1, 2 and 3 and § 77q(b) with respect to the distribution of Javelin stock (R. 201-210). The allegations of the complaint were verified by Jaegerman (R. 211).

August or September 1958—Petitioner permitted Jaegerman to visit Javelin's Montreal offices and "gave instructions that he was to be given access to all corporate files, together with files concerning my personal affairs" (104a).

September 25, 1958—A consent decree entered against petitioner and other defendants in the S. E. C. injunction action, after petitioner voluntarily appeared and caused Canadian Javelin to appear (61a-62a).

October 8, 1958—The S. E. C. announced the removal of Canadian Javelin Ltd. from its Canadian restricted list (65a).

November 12 & 26, 1958—Petitioner executed at the S. E. C.'s request two affidavits relating to his

knowledge of the activities of F. Payson Todd (67a), who is charged in the present indictment as a co-conspirator but not a co-defendant.

November 13 & 14, 1958—The Javelin attorney and Jaegerman discussed the affairs of Javelin with the Quebec Securities Commission (67a, R. 175).

November or December 1958—Petitioner, through the Javelin attorney, furnished Jaegerman with 167 original documents consisting of a file developed by defendant Berman (67a, 75a-87a). In June of 1962 a copy of the file was again furnished Jaegerman (68a).

February 1959—The S. E. C. initiated without success a contempt action against defendant Sherwood for violating the earlier injunction regarding trading in Javelin stock. *United States v. Sherwood,* 175 F. Supp. 480 (S. D. N. Y. 1959).

June 29, 1959—Petitioner and Javelin submitted to the jurisdiction of New York courts for purposes of a complex stockholders' action which petitioner settled (73a, 104a, 155a).

March 23, 1960—Petitioner in cooperation with the S. E. C. testified before a federal grand jury in Boston investigating Todd. Petitioner was advised by the Assistant United States Attorney that he was only a witness (90a).

April 22, 1960—The Boston grand jury indicted Todd on ten counts of security acts violations, after hearing petitioner's testimony. The Todd indictment makes numerous allegations referring to "John C. Doyle, the president of Canadian Javelin, Limited" and his role in the distribution of Javelin stock (126a-140a). On November 28, 1960 upon his plea of *nolo contendere,* Todd was fined and received a suspended sentence (124a-125a).

June 21, 1962—Jaegerman, in a meeting with petitioner, his counsel and a Javelin attorney, after stating that he was interested in "getting Sherwood and Berman" (92a), added that he had "saved the company in 1958 and that maybe that gave him the right to destroy the company in 1962" (93a).

July 2, 1962—The Grand Jury returned the indictment in the instant action and it was sealed at the Government's request without explanation and without a request for the issuance of process against any of the defendants (32a, 181a-182a).

July 1962—The Government claims it requested the Immigration and Naturalization Service to notify it when Sherwood entered the United States. Nothing was requested on Berman (153a, 154a).

July 22, 1962—The five year period after the date of the offense charged in count four expired.

August 23, 1962—The Government commenced an inquiry as to petitioner's claim that there had been a commitment not to prosecute (172a-173a).

April 23, 1963—The Government informed petitioner's counsel of the existence—but not the contents—of the indictment. Counsel was advised that the indictment would be opened on April 24, 1963 (119a, 120a).

April 24, 1963—The Government requested an order vacating an order of April 22, 1963 that the indictment be opened April 24, 1963, and requested that the indictment be opened on April 29, 1963, a date "requested by the S. E. C." through the U. S. Attorney's office (1a, 120a, 185a).

April 26, 1963—The Government received a telegram from the Premier of Newfoundland, "which set in motion further meetings, reviews, and evaluations of the commitment claims" and delayed the unsealing of the indictment until August 6, 1963 (120a).

August 6, 1963—The Government requested the unsealing of the indictment without explanation for the delay. No bench warrants for the arrest of any of the defendants were requested. Summonses were issued for all four defendants (187a).

On these facts, then, this prosecution is barred by the statute of limitations, as well as the constitutional and criminal rule provisions for the speedy disposition of criminal matters.

A. Under the Circumstances of This Case, the Indictment Was Not "Found" on July 2, 1962 for Purposes of the Statute of Limitations.[6]

Basic fairness commands that a criminal prosecution "cannot be said to be instituted until a formal charge is *openly* made against the accused." *United States v. Scully, et al.*, 119 F. Supp. 225, 227 (S. D. N. Y. 1954), aff'd 225 F. 2d 113 (2 Cir. 1955), *cert. denied*, 350 U. S. 897 (Emphasis added). Employment of a secret indictment, as in the circumstances of this case, does violence to the congressional policy that the statute of limitations must be liberally in-

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[6] The applicable statute of limitations provides that no person shall be prosecuted unless the indictment is found within five years after the date of the alleged offense. 18 U. S. C. § 3282. It expired as to count four on July 22, 1962 (38a). Although count four is the sole remaining count, it should be noted that the latest event in the indictment is alleged to have occurred on September 28, 1957, and, thus, the statute of limitations expired as to all offenses charged in the indictment in this case on September 27, 1962.

The Government argued below that the period of limitations on the conspiracy count did not expire until July 1, 1963 because the conspiracy count charges a continuing conspiracy to July 1, 1958. The statute of limitations, contrary to the Government's assertion, commences to run from the last overt act charged in furthering the conspiracy, allegedly September 27, 1957. The overt act is the essential ingredient of the crime. *Fiswick v. United States*, 329 U. S. 211 (1946); *United States v. Cianchetti*, 315 F. 2d 584, 589 (2 Cir. 1963).

terpreted in favor of the accused. *United States v. Scharton*, 285 U. S. 518, 521-522 (1932). Here the sealing of the indictment has thwarted the congressional policy underlying the statute of limitations—protecting a defendant from being put to his defense after memories have faded, witnesses have died, and evidence has been lost by reason of the passage of years. *Chase Securities Corp. v. Donaldson, et al.*, 325 U. S. 304, 314 (1945).

Undisputed are the facts that—without explanation to the court—the indictment remained impounded and under seal from July 2, 1962, to August 6, 1963, a period of thirteen months and four days (32a, 181a-187a) and that petitioner did not even know of the existence of the indictment prior to April 23, 1963 (174a), a period of nearly ten months, and did not know of its contents or the nature of its charges against him for the entire thirteen month period (187a).

The Government concedes (116a-117a, 135a) and the District Court found (172a) that the indictment was initially sealed for a purpose not related to petitioner Doyle. Moreover, at the time the five-year statute of limitation expired on count four, July 22, 1962, the indictment remained sealed for purposes totally unrelated to appellant (153a).

As to petitioner, then, a secret indictment was unnecessary, unjustified and grossly improper. It is basic that "defendants who are available in an indictment naming several defendants should not have their rights endangered by the absent defendant[s]." *United States v. Niarchos*, 125 F. Supp. 214, 232 (D. C. 1954). Petitioner Doyle was within the United States and within the jurisdiction of the court before, on and after July 2, 1962 (147a).

Petitioner, then, either alone or with the other present defendant, could have been indicted openly at any

time. If the Government later felt that a joint trial was necessary, it could have moved for joinder under Rule 13 of the Federal Rules of Criminal Procedure.

Moreover, it is readily apparent from the record that there was no justifiable reason for sealing this indictment as to any of the defendants. Rule 6(e) of the Federal Rules of Criminal Procedure provides that an indictment may be "kept secret until the defendant is in custody or has given bail" and Judge Clarie recognized that this drastic procedure may be utilized "only to accomplish the limited purposes authorized by the criminal rule for which it was designed" (167a).

But in this case the Government's actions are plainly inconsistent with its stated purpose in using a sealed indictment. For example:

(1) The Government sought no warrant or summons for either of the absent defendants at the time the indictment was returned (1a, 32a, 182a). By contrast, a bench warrant was obtained in the other case in which an indictment was returned by the same grand jury at the same time (32a, 182a).

(2) The Government had no recommendation regarding bond for any of the defendants (32a, 182a).

(3) While contending that it asked the Immigration and Naturalization Service to look out for the return to the United States of *one* of the absent defendants (154a), the Government does not even claim *any* action was taken to compel the other absent defendant's attendance for more than thirteen months after the indictment was initially returned (2a). Indeed, the other absent defendant returned to the United States in January 1963 (R. 291).

(4) On August 6, 1963, when the sealed indictment was finally opened, the Government sought only a sum-

mons and not a warrant for each of the defendants (1a, 187a).

These actions point to the unmistakable conclusion that the original sealing of the indictment could not have been to bring the defendants into custody, the singularly narrow purpose of Rule 6(e). For this reason, the sealing and impounding of the indictment was improper.

For more than a year the contents of the indictment remained unknown to petitioner. For nearly ten months he could not even know of its existence; for an additional three months he could only await its thrust. He could not know his accusers or the nature of the charges against him. For him, during this period all of the magnificent protections of our law were nullified. He could neither move to dismiss nor could he take any other effective action to defend himself. He could only await the unknown and the unseen.

Ultimately, of course, this tactic was scored for the weapon of persecution that it was and the other three defendants were dismissed from the case. In this ruling, Judge Clarie found prejudice as a matter of law in recognizing that the constitutional rights of the other three defendants had been infringed (168a). At the same time, he pointed out that the "five-year criminal statute of limitations would have little or no meaning were the law to be construed otherwise" (168a), and noted that the Government's tactic could "defeat the statute's intended legislative purpose namely, of bringing into repose at some specific terminal date, exposure to prosecution and an end to litigation" (164a).

Although the court below recognized that the long-delayed secret indictment required dismissal as to three defendants, it rejected petitioner's similar claims with this conclusion: "From August 23, 1962, or at least from early

September 1962, the continued sealing was materially contributed to and caused by defendant's [Doyle's] own efforts" (174a). This conclusion, however, is misleading, and in any meaningful sense, inaccurate.

To be sure, on or about August 23, 1962, petitioner's counsel informed the Department of Justice that there had been a commitment by the S. E. C. not to prosecute petitioner, and as a result, the Department of Justice voluntarily "commenced a full-scale inquiry into these allegations" (119a, 173a). This certainly is hardly sufficient to lead to a conclusion that petitioner's efforts "materially contributed to" or "caused" the "continued sealing" of the indictment so as to bar petitioner's rights.

As noted, petitioner was not aware of the existence of the indictment and, therefore, could not be held to have waived his essential rights by transmitting information regarding the commitment to the Justice Department. *Fouts v. United States*, 253 F. 2d 215, 218 (6 Cir. 1958); *Taylor v. United States*, 238 F. 2d 259, 261 (D. C. Cir. 1956). In addition to the fact that petitioner had no control over the sealing or unsealing of the indictment, he could not be considered knowingly to have brought about or acquiesced in the sealing or continuation of the sealing of the indictment of which he had no knowledge. In no other sense is it meaningful to say he "caused" or "contributed" to the delay here, for in the absence of such knowledge no conduct could be deemed a waiver of any fundamental right. This important principle was recognized by Judge Clarie in his dismissal of the indictment as to the other three defendants: "When an indictment is kept secret and a defendant knows not of its existence, he cannot be said to have waived a constitutional right pertaining to it" (166a). There can be in this context no valid distinction between a constitutional right and the

right to rely on the statute of limitations, an equally effective and absolute bar to prosecution.

Moreover, even assuming, *arguendo*, that petitioner "caused" the delay as the court below erroneously concluded, this could not toll the statute. Whatever action was taken by the Government was not only with complete knowledge of essential facts, but was also entirely voluntary on the Government's part. "[S]uch voluntary action does not toll the statute of limitations in a criminal prosecution." *Benes v. United States*, 276 F. 2d 99, 109 (6 Cir. 1960). In *Benes* the court stated:

> "And the general rule is further that an indictment, found after the expiration of the time for beginning prosecution, is barred by the statute of limitations and is not waived by the fact that the prosecution was withheld on account of an agreement with the accused, or by the fact that the accused procured continuances of the preliminary hearing from time to time until the period of limitation had expired. Commonwealth v. Werner, 5 Pa. Super. 249; People v. Ayhens, 85 Cal. 86, 24 P. 635; 22 C. J. S. Criminal Law § 235, pp. 365-366; 16 C. J., p. 231, Note 61."

The logic of the *Benes* case applies with even greater force to petitioner Doyle's situation because of the difference in knowledge of the accused in each case. In *Benes* the accused could have known exactly what his legal position was in relation to the applicable statute of limitations. In this case petitioner did not even know of the existence of the indictment against him, much less did he know of any of the specific charges contained in the indictment or the dates alleged. The statute of limitations ran on count four of the Doyle indictment on July 22, 1962; petitioner was not even informed of the existence of the indictment until nearly ten months after that date.

In its denial of petitioner's motion to dismiss, the District Court stated that counsel for petitioner had admitted "actual" knowledge of the indictment on and after April 23, 1963, and further stated his own conclusion that "at that time every effort was made to prevent its unsealing" (174a). Any such post-April 23 efforts are completely irrelevant to a period of limitations which had expired on July 22 of the preceding year as to count four—even before the Government had commenced any investigation into whether a commitment had been made to petitioner (118a).

For these reasons considerations of justice and fairness dictate that no indictment should be considered "found" for statute of limitations purposes before its existence is even known to the accused, provided his availability, as here, is not in issue. Petitioner is well aware that there have been, however, at least three cases involving secret indictments where, on the particular facts of those cases, courts have held the indictments to be "found" on the dates they were returned. An analysis of those cases, without considering for the moment whether they were rightly decided, shows that they are plainly inapplicable to the facts of this case.

In *United States v. Michael,* 180 F. 2d 55 (3 Cir. 1949), *cert. denied,* 339 U. S. 978 (1950), the court, after implying that the Government's action in sealing the indictment was reasonable, held that the defendant was not, in fact, prejudiced by a delay of 54 days in making the indictment public. 180 F. 2d at 57. The *Michael* case was endorsed in two companion cases decided at the same time in the District Court for the District of Columbia. *United States v. Niarchos, supra,* 125 F. Supp. 214 (D. C. 1954); *United States v. Onassis,* 125 F. Supp. 190 (D. C. 1954).

The court in *Niarchos*, however, pointed to the necessity for preserving the purpose of the statute of limitations and cautioned that "the *Michael* case should not be interpreted too broadly" 125 F. Supp. at 232. Here again, both *Onassis* and *Niarchos* found the action in sealing the indictment was reasonable under the circumstances, 125 F. Supp. at 213; 125 F. Supp. at 232, and denied the motion to dismiss because of a specific finding that there was no prejudice by the delay.

In the case at bar—and contrary to *Michael, Onassis* and *Niarchos*—the sealing was not justified as to petitioner (172a), and a finding of lack of prejudice was not, and indeed could not, be made. The trial court here held that 90 days was the maximum period during which the indictment might reasonably have remained secret and under seal (168a). Beyond that period it found prejudice as a matter of law to three defendants in circumstances substantially identical to those of petitioner Doyle. This 90 day period expired on October 1, 1962—more than six months prior to petitioner's first knowledge of the existence of the indictment.

In this context the showing of prejudice to petitioner's rights from use of the secret indictment is clear and unmistakable. The effect of this prejudice was heightened when the indictment as to the other three defendants was dismissed and the entire weight of the prosecution fell on petitioner Doyle. Thus, the *Michael, Niarchos,* and *Onassis* cases are inapplicable to this case.[7] A decision by this Court on this important question is highly desirable!

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[7] More persuasive and far better than these cases in preserving the essential elements of fairness is the rule set out in *United States v. Jurzykowski*, 159 F. Supp. 7, 10 (N. D. N. Y. 1957), interpreting the statute of limitations provision of the Internal Revenue Code. There the court said: "the section would be without

(Continued on following page)

B. By the Government's Purposeful and Oppressive Delay in This Case, Petitioner Was Deprived of His Constitutional Rights to Due Process and to a Speedy Trial, as Well as His Rights Guaranteed by Rule 48(b).

In determining whether petitioner's right to a speedy trial has been denied in this case, consideration must be given to the delay which occurred before July 2, 1962, the date of the "return" of the indictment, as well as to delay after that date. Contrary to the Government's position that pre-indictment delay—regardless of the purpose or the oppressive nature of the delay—is governed solely by the statute of limitations and not the Fifth or Sixth Amendments or Rule 48(b), the courts have now recognized that pre-indictment delay, irrespective of the statute of limitations, is an equally important factor and in certain cases can lead to a violation of constitutional protections.

This recognition of the constitutional importance of a delay in instituting formal proceedings is best stated in the concurring opinion of Judge Wright in *Nickens v. United States*, 323 F. 2d 808, 812 (D. C. Cir. 1963):

> "That the delay in doing justice in this case occurred between offense and formal complaint, rather than between complaint and indictment or indictment and trial does not immunize it from the constitutional command. The right of a suspect to speedy determination of guilt or innocence is not lost merely because the delay in the process occurred before the formal charge, rather than after it. *Mann v. United States, supra.*"

(Continued from preceding page)

purpose unless notice thereof was given to the defendant." The same essentiality of actual notice was recognized in *Flemister v. United States*, 260 F. 2d 513, 516 (5 Cir. 1958), where *Jurzykowski* was cited with approval. It is this kind of reasoning, as contrasted with that of the *Michael-Niarchos-Onassis* cases, which must be relied on to preserve the rights of individual defendants under the statute of limitations.

In *Mann v. United States*, 304 F. 2d 394, 396-97 n. 4 (D. C. Cir.), *cert. denied* 371 U. S. 896 (1962), to which Judge Wright refers, a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit had similarly declared:

> "* * * the constitutional guarantee protects against undue delays in presenting the formal charge as well as delays between indictment and trial. The Supreme Court's affirmance of Judge Thomsen's ruling in Provoo, infra, seems to have settled the point. See also our opinion in Taylor, infra. In a non-capital case, it is true, mere delay in presenting the charge will rarely work a deprivation of the constitutional right, for permissible time in that instance is normally governed by the statute of limitations. Yet, if the delay is 'purposeful or oppressive,' Pollard v. United States, 352 U. S. 354, 361, 77 S. Ct. 481, 1 L. Ed. 2d 393, even an indictment within the limitation period may come too late to square with the Sixth Amendment."

While Judge Burger, writing for the majority, in the *Nickens* case, *supra*, takes issue with this interpretation of the Sixth Amendment, an examination of Judge Burger's opinion reveals that this difference is one of semantics, rather than one of substance. Thus, after stating that Nickens' claim of pre-indictment delay was not relevant to his Sixth Amendment right to a speedy trial, Judge Burger added, quite pointedly:

> "This is not to suggest that delay between offense and prosecution could not be so oppressive as to constitute a denial of due process. Cf. Petition of Provoo, *supra*, 17 F. R. D. at 202 (citing Supreme Court cases finding denials of fourteenth amendment due process); *United States v. McWilliams*, 69 F. Supp. 812, 814 (D. D. C. 1946). (Semble alternative holding), Aff'd 82 U. S. App. D. C. 259, 163 F. 2d 695 (1947); Note, The

> Right to a Speedy Trial, 57 Colum. L. Rev. 846, 860-63 (1957) * * * [d]ue process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused * * *." *Nickens v. United States, supra,* 323 F. 2d at 810, n. 2.

From this statement it is apparent that the only difference between the opinion of Judge Burger in the *Nickens* case and that of Judge Wright in the same case, and of the unanimous court in the *Mann* case, is whether an unreasonable and oppressive delay in bringing formal charges against the accused constitutes a denial of the accused's right to due process or his right to a speedy trial. All are in agreement that such a delay constitutes a clear denial of the defendant's constitutional rights.

Similar recognition is found in the earlier decisions in *Taylor v. United States,* 238 F. 2d 259 (D. C. Cir. 1956), and *Fouts v. United States,* 253 F. 2d 215, 217 (6 Cir. 1958). In the *Fouts* case, the Sixth Circuit stated, "the number of years having elapsed since the commission of the offense is an important, but not conclusive criterion [in determining whether the defendant has been denied his right to a speedy trial]." *In the Taylor case, the court held that the defendant's right to a speedy trial had been denied by the combination of the long delay in bringing the indictment and the long delay between the indictment and trial.*

The most recent decision along these lines is that of Judge Youngdahl in *United States v. Burke,* 224 F. Supp. 41 (D. C. 1963).

> "This court has concluded that the time should be computed not from the time of the presentment of either indictment, but rather from the time of the offenses themselves * * *. Although the periods between

offenses and indictment, and between indictment and trial would normally be computed separately, there are exceptional circumstances when the constitutional guarantee of a speedy trial necessitates considering the entire period between offense and eventual trial in order to determine whether the guarantee has been violated. Petition of Provoo, 17 F. R. D. 183 (D. Md. 1955) aff'd, per curiam, 350 U. S. 857, 76 S. Ct. 101, 100 L. Ed. 761 (1955); *United States v. Barnes*, 175 F. Supp. 60 (D. Calif. 1959)." 224 F. Supp. at 45-46.

The above decisions show clearly that the courts will no longer close their eyes to the length of the delay before indictment in determining whether the accused has been denied his constitutional right to due process and speedy trial. Moreover, the length, oppressiveness and purposefulness of the combined delay in this case, and the resulting prejudice to defendant are special reasons for consideration of combined delay here.

Under Rule 48(b) unnecessary delay in presenting the case to the grand jury is sufficient to cause dismissal of the indictment. Even courts which restrict the application of the Sixth Amendment guarantee to delays subsequent to the indictment, because of the statute of limtiations, have considered the statute of limitations argument (that the sole measuring device of pre-indictment delay is the applicable statute of limitations) inapplicable to a dismissal for want of prosecution situation under Rule 48(b). *Foley v. United States*, 290 F. 2d 562 (8 Cir. 1961). In *Foley*, which rejects the Government's argument that Rule 48(b) applies only in an arrest situation, the defendant was indicted in 1959 for alleged tax offenses in 1952 and 1953; and there was no indication that the defendant was arrested prior to indictment. The court denied the defendant's motion to dismiss the indictment under Rule 48(b) not because of the statute of limitations, not because the defendant was not

held to answer, but solely because the court found that the Government investigation in preparation for the presentment to the grand jury was of necessity a "commodious task," *especially since the defendant refused to turn over books or records to the Government.*

As another court has held, where a defendant establishes by "sifted evidence and demonstrated facts" that there has been unnecessary delay by the prosecution in presenting the charge to the grand jury, his motion for dismissal of the indictment under Rule 48(b) should be granted. *United States v. Sawyers,* 186 F. Supp. 264 (N. D. Calif. 1960).

The "intentional and vexatious delay" which was not shown in *Foley* and the "sifted evidence and demonstrated facts" which were not present in *Sawyers* are certainly evident in the present case, where the delay in presenting the charge to the grand jury was not only inordinate, but also deliberate and oppressive.

What was not shown in *Foley* is shown here; it would have not been a "commodious" task to present the instant matter to a grand jury much earlier, since the events of 1958-1960, noted previously, make it clear that a thorough investigation of appellant and Canadian Javelin had been completed by the Government.

In measuring delay, whether in terms of the Fifth or Sixth Amendments or Rule 48(b), the question is ultimately whether the delay was purposeful and oppressive. *Pollard v. United States,* 352 U. S. 354, 361-362 (1957). Indeed, the best evidence of deliberate and oppressive delay to the appellant is the record of events in this case, detailed in the initial section of this portion of appellant's brief.

Without doubt, there was no need for a four year delay from July 1958, when Javelin stock was put on the Cana-

dian Restricted List, to gather evidence concerning the alleged offenses. With the filing of the complaint on September 24, 1958, alleging violations of the Securities Act of 1933 similar to those contained in the indictment filed and sealed almost four years later, the Government's case must have been sufficiently complete to allow the institution of formal proceedings—sufficiently complete so that the Government could not need an extended period before presentation to a grand jury. On this foundation, further delay was unjustified and unreasonable.

Moreover, the Government's attempted explanation of delay (156a) is without merit, for by 1960 it had had, as it admits, access to "three hundred fifty-seven exhibits," "appraisal reports, affidavits of defendant Doyle, ore test reports, stock transfer records, brokerage account records," and 2766 pages of transcript and 749 pages of pre-trial deposition of Doyle; and extensive hearings before the S. E. C. beginning in March 1960 (156a).

The Government can find no comfort in its claim that it delayed the indictment because it had a higher burden of proof in the present action than in the earlier civil action involving petitioner and Javelin. By April 1960 the Government proceeded criminally against Todd for violations of the Securities Act of 1933 involving appellant and sales of Javelin stock and, of course, had the usual criminal burden of proof. It is obvious that in the Government's view the *Todd* and *Doyle* cases were closely related. Todd is identified as a co-conspirator in the Doyle indictment; the Todd indictment refers to the activities of Doyle in connection with the distribution of Javelin stock; and Doyle testified at length at the Todd grand jury proceedings (90a). It can hardly be said that the Government, which had sufficient evidence to proceed against Todd in 1960, did not also have sufficient evidence to proceed at that time against petitioner Doyle.

Surely, no proper motive can explain the conference of June 21, 1962. At this "eleventh hour conference" petitioner was induced to make further statements and provide additional information (96a-100a). At that very time, within 12 days of the return of the indictment, the decision to go ahead with criminal proceedings must have been made. In these circumstances the delay is patently purposeful. That it was without justification is equally clear and it seems equally plain that the investigation of petitioner's claim that he has been promised that there would be no prosecution hardly required thirteen months.

During the period between July 2, 1962, and early September of the same year, the indictment was kept under seal for a reason which admittedly had nothing to do with petitioner—the presumed absence of co-defendants Sherwood and Berman (166a). It was recognized by this Court in *United States v. Cianchetti*, 315 F. 2d 584, 588 (2 Cir. 1963), that "the trial of an individual properly joined with others in a conspiracy indictment should not be delayed indefinitely to await the capture of a fugitive co-conspirator."

It is demonstrably clear that the combined delay was oppressive. The delay between the date of the offense alleged in count four, of which petitioner was convicted, and the date petitioner first learned of the contents of the indictment was approximately six years. The length of this delay alone is sufficient to render its oppressive. The effect of such a delay was aptly described in *United States v. McWilliams*, 69 F. Supp. 812, 815 (D. C. 1946):

> "As in all long delayed cases, the witnesses are now scattered; some are not accessible * * * the memories of witnesses as to events occurring many years ago are not clear. It is for these reasons among others that the Constitution of the United States requires a speedy trial and that the Congress of the United States has imposed Statute of Limitations to prevent long

delayed prosecutions. *I do not see now how these defendants can possibly obtain fair trials.*" (Emphasis added.)

These remarks are strikingly applicable to the present case. As stated in *United States v. Chase*, 135 F. Supp. 230, 232 (N. D. Ill. 1955), "It is a basic concept of our system of justice, articulated and made secure by the Sixth Amendment, that a fair and impartial trial is impossible after a long lapse of time." In short, the length of the delay alone in this case is sufficient to demonstrate its oppressiveness as that term is used in the Supreme Court's decision in *Pollard, supra.*

As to the suggestion that a showing of actual prejudice is necessary to support the claim of denial of a right to speedy trial, such a requirement was expressly rejected by this Court in *United States v. Lustman*, 258 F. 2d 475, 478 (2 Cir.), *cert. denied* 358 U. S. 880 (1958), when it was stated "a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment. [Citing *Taylor v. United States, supra,* and *Petition of Provoo,* 17 F. R. D. 183 (Md.), *aff'd* per curiam, 350 U. S. 857 (1955)]." This same view was adopted by the Supreme Court in its recent decision in *White v. Maryland,* 373 U. S. 59 (1963) and in *Hamilton v. Alabama,* 368 U. S. 52 (1961).

It is apparent from these considerations that the combined delay occurring between the date of the offenses alleged and the return of the indictment on July 2, 1962, and between July 2, 1962, and April 23, 1963, the date petitioner was first notified of the indictment, was unjustified, purposeful and oppressive. Accordingly, under the rule of the *Pollard* case and the other decisions upholding the defendant's constitutional rights, *Taylor v. United*

States, supra; Petition of Provoo, supra, this delay constituted a denial of petitioner's right to due process and a speedy trial, as well as his rights guaranteed by Rule 48(b).

(C) The Effect of the Second Circuit's Ruling on These Issues.

The Court of Appeals did not comment on any aspect of the issues here raised except to note parenthetically that it appeared by the conduct of Doyle's counsel that a waiver of the delay in unsealing would likely, had it been sought, have been given in order that the Government might investigate the immunity claim. This answer does not reach the Statute of Limitations contention at all, see *Benes, supra.* And in respect of the Speedy Trial, Due Process and 48(b) contentions, we can but note that the Circuit Court's decision again returns to the tortured philosophy of presumed and inferential waiver. The easy answer is that the Government, if it meant to confer a "favor" on defendant, should have given him the choice—of sealing or unsealing,—it cannot choose for him and then infer waiver.

The questions here raised are certainly worthy of the grant of certiorari by this Court. The effect of the sealing an indictment for thirteen months, and for almost a year past the time bar of the limitations statute present novel questions to this Court which are most important in the administration of justice.

III. THE COURT INCORRECTLY IMPOSED SENTENCE.

By his plea, petitioner admitted no more than a violation of the Securities Act of 1933 in respect of 50 shares of Javelin stock (38a, 210a). When he stood before the court on May 3, 1965, petitioner, however, was sentenced on the basis of an alleged but unproved participation in what

the Government considered a "massive distribution of stock on the part of Doyle and his associates, involving millions of shares" (210a). He was sentenced, not for the offense to which he pleaded guilty, but for other offenses detailed in a secret pre-sentence report unavailable to petitioner—offenses to which he did not plead, and would never have pleaded, guilty and with regard to which he was—and still is—presumed innocent.

These facts call for a review of the sentencing procedure under this Court's exercise of its supervisory power "to formulate and apply proper standards for enforcement of the criminal law," *Marshall v. United States*, 360 U. S. 310, 313 (1959) and "over federal law enforcement agencies," *Rea v. United States*, 350 U. S. 214, 217 (1956).

That the court utilized an improper criterion is patent from the remarks of the court at sentence:

> "Now counsel has well stated, of course, that we are concerned directly with 50 shares of stock. But, the Probation Officer's report also indicates that this failure to register permitted the sale of many thousands of persons of several millions of shares—two and a half, I think, millions of shares of stock, without the registration statements having been filed" (204a).

The fact is that there simply were not 2,500,000 shares, or anywhere near that amount, available for sale by petitioner or Javelin in the years encompassed in the indictment[8] (209a).

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[8] It is apparent that the District Court was misled by the information contained in the probation report as to the facts in this case. As this Court is well aware, the sale of stock of a Canadian company in the United States without a registration statement being in effect is not necessarily a violation of the Securities Act of 1933. What the Act proscribes is a public offering or sale, without a registration statement, by an issuer, dealer or underwriter. If, in fact, 2,500,000 shares of Javelin stock were

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Between February 3 and May 3, 1965, representatives of the Department of Justice and the S. E. C. spent many hours with the probation officer (211a). That they were the source of the erroneous information about the 2,500,000 shares is apparent from the statements of the Justice Department Attorney to the court below on May 17, 1965:

> "I would like to represent to this Court, and I am sure Mr. Christy will not disagree, that on February 19, 1965—although he may not remember the precise date—he telephoned me and told me that he was concerned about certain questions being asked by the probation officer of his client or people involved with his client, which indicated to him that information might be given going beyond these fifty shares, or even beyond the indictment.
>
> "And at that time I told him in no uncertain terms that to fulfill the requests of the probation officer, or your Honor's request, as conveyed through the probation officer, we would have no hesitancy about supplying information beyond, going beyond Count Four dealing with the fifty shares, or even going beyond the indictment; that your Honor had a right to know everything you could about the Defendant, and anything your Honor wishes to have, your Honor would have a right to have" (209a).

In view of the remarks of the court at the time of sentence, counsel asked on May 17, 1965, either for a copy of the probation report or excerpts therefrom, but this was denied (214a). The reason for the request was apparent—to give petitioner an opportunity to meet and refute infor-

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traded within the United States in the years involved, there still might be no violation. That the information the court had was erroneous or that the court misunderstood the information is apparent from its remark that "this failure to register permitted the sale to many thousands of persons of several millions of shares" (204a), for clearly it is not the failure to register that permits sales.

mation turned over to the probation officer by representatives of the Department of Justice and the S. E. C. and contained in the Probation Report which may have been erroneous. Moreover, petitioner is entitled to understand and not be misled as to the nature and character of the information which will be considered by the court in sentencing, see footnotes 4, *supra* and 12, *infra*.

Petitioner does not contend that the court is strictly limited, in imposing sentence, to the framework of a count upon which a defendant is found guilty; the court should have information about the defendant's background, character and criminal record, if any, and, in general, information as to what kind of man stands before the court for sentence. But petitioner does contend that he should not be sentenced on the basis of unproved allegations in, and in addition to, dismissed counts of the indictment. The procedure employed in his sentencing destroys the presumption of innocence to which he is entitled on those counts.

In *Townsend v. Burke*, 334 U. S. 736, 741 (1948), where the trial judge discussed the defendant's past criminal record in sentencing him, the Supreme Court found that since much of the information regarding the criminal record was false, the defendant had been denied due process of law. The court said:

> "* * * this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law and such a conviction cannot stand."[9]

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[9] *Williams v. New York*, 337 U. S. 241 (1949) and *Williams v. Oklahoma*, 358 U. S. 576, rehearing denied 359 U. S. 956 (1959) —are not to the contrary, since the only questions presented by those cases were whether the defendant had the right to cross-

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Here petitioner pleaded guilty to the delivery of 50 shares; the remaining counts in the indictment covered approximately 2,000 shares; and yet petitioner was sentenced on a basis of alleged distribution of 2,500,000 shares.

In *Smith v. United States*, 223 F. 2d 750 (5 Cir. 1955), a proceeding was brought under 28 U. S. C. § 2255. The petitioner claimed that prior to the imposition of sentence, an F. B. I. agent met with the Judge in Chambers and informed the Judge that the petitioner had admitted committing a number of crimes. In his petition, the petitioner denied both the commission of crimes and the alleged admissions. In granting a hearing, the Court held:

> "The due process clause of the Fifth Amendment protects those convicted in the federal courts no less than that of the Fourteenth Amendment protects those convicted in the state courts. If, as the motion alleges, the defendant had not been convicted of, and had not committed, the crimes about which it is alleged that agent Lill informed the district court, and if Agent Lill did, in fact, give false information as alleged to the district court, then the defendant's sentence would be lacking in due process, and subject to attack under Section 2255." 223 F. 2d at 754. See also *United States v. Magliano*, 336 F. 2d 817, 822-823 (4 Cir. 1964).

Basic fairness requires that the information on which a defendant's freedom may depend be accurate; a sentence should not be based on all of the allegations which the Government conceived it could prove at the time of trial.

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examine witnesses who provided information to the probation officer and whether the sentencing judge could consider a kidnapper's murder of his victim in sentencing him, where there was no pre-sentencing report, and defendant's counsel was informed of the source of the judge's information.

> "In the overwhelming majority of federal criminal cases the accused is found to be guilty. In most instances his conviction follows from his own plea rather than any trial. To most defendants, then, the vital question in their case from the outset is not guilt or innocence, but sentence." Report by District of Columbia Bar Association to Judicial Conference of District of Columbia Circuit, 33 F. R. D. 47, 127 (1963).

Basic fairness should also require that the information on which a defendant's freedom may depend should not be kept secret from him. To be sure, federal appellate courts do not ordinarily review a criminal sentence that is within the statutory limits, although there is occasional dicta to the effect that an appellate court may review a sentence to correct an abuse of discretion. *United States v. Hetherington,* 279 F. 2d 792, 796 (7 Cir. 1960); *Livers v. United States,* 185 F. 2d 807, 809 (6 Cir. 1950); *Tincher et al. v. United States,* 11 F. 2d 18, 21 (4 Cir. 1926). But petitioner at this point does not challenge the length of sentence imposed, but the criteria utilized in imposing sentence. There is ample authority for review of this issue. *Peters v. United States,* 307 F. 2d 193 (D. C. Cir. 1962); *Leach v. United States,* 334 F. 2d 945 (D. C. Cir. 1964); *United States v. Wiley,* 267 F. 2d 453 (7 Cir. 1959).

In *Wiley,* the Seventh Circuit invalidated the district court's sentencing criterion, pursuant to which the district court arbitrarily singled out one of a group of defendants—those who elected to have guilt determined by a trial rather than plea—for imposition of a severe sentence. The appellate court did "not hesitate to correct the disparity" in "exercising its supervisory control of the district court * * *" 278 F. 2d at 503.

Here, too, the issues are significant for the administration of criminal justice. Petitioner recognizes that the

trial judge is entitled in the pre-sentence report to a broad range of information about the accused, his background and his conduct. Information need not be excluded from the report because it is hearsay or would otherwise be objectionable at trial. In this case, however, the trial judge relied on information relating to the very counts of the indictment that were dismissed on motion of the Government. This, Petitioner believes, raises a question of procedural propriety worthy of consideration by the Supreme Court.

Moreover, especially if the trial court is entitled to rely on it, an accused should be given notice of adverse material and opportunity to meet it. This is the practice in a number of circuits, see, e.g. *Stephan v. United States*, 133 F. 2d 87, 100 (6th Cir. 1943); *Pence v. United States*, 219 F. 2d 70 (10th Cir. 1955); *Zeff v. Sanford*, 31 F. Supp. 736, 738 (N. D. Ga. 1940),[10] and in many states, see, e.g. *State v. Harman*, 147 Conn. 125, 157 A. 2d 594, 595 (1956); *State v. Bennes*, 16 N. J. 389, 108 A. 2d 846 (1954); *Driver v. State*, 201 Md. 25, 92 A. 2d 570 (1952).[11]

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[10] In *Zeff v. Sanford*, 31 F. Supp. 376, 378 (N. D. Ga. 1940), *affirmed per curiam* 114 F. 2d 1018 (5 Cir. 1940), the Court said:

> "* * * Any information not received from the accused himself or given in his presence, which might influence the judgment should be called to his attention without unnecessarily disclosing the sources of such information * * *."

[11] Including the court of the State of Connecticut, whose statutes, like the Federal Rules of Criminal Procedure, are silent as to whether disclosure should be made (Conn. Gen. Stat. § 54-109). In *State v. Harmon*, 157 A. 2d 594, 596, 147 Conn. 125 (1956), the Connecticut court stated:

> "Under our practice, a defendant is not deprived of the right of challenging the statement in the report. His counsel is furnished, as in the instant case, with a copy of the report in order that its contents may be made known to the defendant and an opportunity afforded him to explain or controvert the statements contained in it."

See also *Hoopsick Petition*, 172 Pa. Sup. 12, 91 A. 2d 241 (1952); *State v. Moore*, 10 Terry 29, 49 Del. 29, 36, 108 A. 2d 675.

It has been recommended for adoption by the Advisory Committee on the Federal Rules of Criminal Procedure. Rule 32(c) (2), Second Preliminary Draft, Proposed Amendments to Rules of Criminal Procedures for United States District Courts, March, 1964. It can and should be imposed by the Supreme Court in the exercise of its supervisory jurisdiction. Reliance on a secret dossier at any stage of a criminal proceeding is at odds with basic ideas of fair procedure.[12]

CONCLUSION.

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted for the reasons above set forth. Petitioner respectfully further urges that each of the questions submitted on the face of this Petition are novel questions before this Court, involve important considerations in constitutional law, and in the administration of criminal justice; and on which the various Circuits' rulings and approaches are in conflict respectively one

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[12] Recent conversations between counsel for Doyle and the Government would indicate that other highly controversial material may have been submitted to the probation officer attacking the good faith and honesty of defendant in pressing certain contentions before the Department of Justice and the Court. Petitioner was entirely unaware of such presentation, and consequently did not present evidence contra. Petitioner categorically denies any such impropriety. If it is true that such malignant and false material was presented, such procedure, i.e. sentencing upon secret material which defendant cannot suspect or meet and which impugned the integrity of defendant—is at variance with due process requirements. See *Smith, supra.*

with the other. A clear enunciation of law on each of these important considerations by this Court is highly desirable.

Respectfully submitted,

MOSES KRISLOV,
566 Hanna Bldg., Cleveland, Ohio 44115,

ARTHUR H. CHRISTY,
CARL F. TRUNK, JR.,
30 Rockefeller Plaza, New York, N. Y. 10020,

Counsel for Petitioner.

APPENDIX.

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 556—September Term, 1964.
(Argued June 10, 1965 Decided June 28, 1965.)
Docket No. 29750.

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN CHRISTOPHER DOYLE,
Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,
Circuit Judges.

John Christopher Doyle appeals from a judgment of the District Court for Connecticut, T. Emmet Clarie, *Judge,* sentencing him after a plea of guilty to one count of an eleven-count indictment which charged him and others with offenses under the Securities Act of 1933. He contends that because the indictment remained impounded for 13 months after the running of the five-year statute of limitations, 18 U. S. C. § 3282, the prosecution was time-barred and violated his right to a speedy trial, and also that the judge took improper considerations into account with respect to sentence. Affirmed.

ABRAM CHAYES, Washington, D. C. (David Goldstein, Jacob D. Zeldes, Bridgeport, Conn., Arthur H. Christy, Carl F. Trunk, Jr., New York, N. Y., on brief), *for Appellant.*

HERBERT EDELHERTZ (Jon Newman, United States Attorney for the District of Connecticut, Victor C. Woerheide, Joseph Shortall, Attorneys, Washington, D. C.), *for Appellee.*

FRIENDLY, *Circuit Judge*:

On July 2, 1962, a grand jury in the District Court for Connecticut filed an eleven-count indictment against appellant Doyle and three other defendants, Sherwood, Berman, and Korn, charging violations of the Securities Act of 1933 in connection with the offer and sale of stock of Canadian Javelin, Ltd. Counts 1, 2 (dismissed on the Government's motion independently of the proceedings later recounted), 6, 7, 8, 9 and 10 alleged use of the mails in the fraudulent or manipulated advertising or sale of securities in violation of 15 U. S. C. § 77q at various dates between July and late September, 1957. Counts 3, 4 and 5 charged use of the mails to sell unregistered shares of Canadian Javelin on July 10, 23, and 31, 1957, in violation of 15 U. S. C. § 77e(a). Count 11 charged a conspiracy to defraud the United States by impeding the SEC in protecting investors and to violate 15 U. S. C. §§ 77e(a) and 77q. The conspiracy was alleged to have begun prior to January 1, 1955 and to have continued until about July 1, 1958; the overt acts were those forming the basis for the ten substantive counts plus ten others, the last on September 27, 1957.

On the Government's request the indictment was immediately ordered to be impounded. Although the reason was not of record, there is no dispute that it was because Sherwood and Berman were outside the United States and the Government feared that disclosure would prevent a return which otherwise might shortly occur. The Government states its initial intention was to continue the im-

pounding only for a few months. However, in late August, 1962, a Washington attorney, now deceased, called at the Department of Justice and presented papers purporting to show that the SEC had entered into an agreement with a New York lawyer, also representing Doyle, "which was inconsistent with any prosecution of defendant Doyle in connection with the distribution or sale of the stock of Canadian Javelin, Ltd. prior to July 1, 1958." The Department began a detailed inquiry into this alleged agreement, which lasted for many months.

The indictment remained impounded, the reason for the continuation of this beyond early September, 1962, being, according to the Department, the necessity of resolving the issue of the alleged commitment by the SEC which Doyle had raised. About April 16, 1963, the Department made a determination to proceed with the prosecution, and on April 22, on motion of the Government, Judge Anderson ordered that the indictment be released on April 24. The Department having courteously informed a second New York lawyer representing Doyle that a decision had been made to go forward, he and the two previously mentioned made telephone calls to the Department which, as said in the affidavit of the Chief of the Fraud Section, "initiated a chain of events leading to the Government's request" that the indictment remain impounded, as it did until August 6, 1963. Appellant concedes that "from April 23, 1963 to August 6, 1963, when the indictment was unsealed, the delay in unsealing was at the request of Mr. Doyle or his attorneys." Although the Government does not allege a similar express request prior to April 23, 1963, it claims, quite reasonably, to have thought that release of the indictment would have been at odds with the investigation it was conducting at Doyle's instance, and the second New York attorney con-

ceded, in an affidavit to the district court, "in candor I must also say that by presenting the Department with evidence of a commitment I hoped they would hold up whatever it was they were doing, that is, if they were still considering prosecution that they give up the idea or if there was an indictment, that it be dismissed."

After making various motions Doyle pleaded not guilty to all counts, as the other defendants also did. All moved, pursuant to F. R. Cr. P. 12(b), that the indictment be dismissed on the grounds that, because of the long impounding, the prosecution was barred by the five-year statute of limitations, 18 U. S. C. § 3282, they had been denied the right to a speedy trial guaranteed by the Sixth Amendment, and there had been unnecessary delay in bringing them to trial within F. R. Cr. P. 48(b). Judge Clarie granted the motions of Sherwood, Berman and Korn, because of the long delay in unsealing the indictment after the fall of 1962 for reasons unrelated to the prompt obtaining of custody, see F. R. Cr. P. 6(e). However, the court denied Doyle's motion, finding that the sealing of the indictment from July 2 to August 23, 1962, to obtain custody of Sherwood and Berman was reasonable[1] and that thereafter "the continued sealing was materially contributed to and caused by the defendant's own efforts."

During the fall and winter of 1964, many further motions relating to Doyle were decided. At a pretrial hearing on February 2, 1965, Judge Clarie announced he reluctantly would grant a request by Doyle, consented to by the Government, for an adjournment until the next day to enable counsel to agree on certain dates on which the evi-

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[1] It should be noted that on August 23, 1962, the statute of limitations had not run on Counts 9, 10 or 11 (the conspiracy count).

dence would be focused, "with the understanding that there will be no further continuance in this case for any reason whatsoever." When counsel appeared the next morning, Doyle's trial counsel, a Connecticut attorney of wide experience, announced "there is going to be a change of plea in our case, John Doyle. We would like to change the plea." After interrogating Doyle, Judge Clarie inquired whether "the defendant is to be put to plea on all counts?" The United States Attorney responded that the changed plea was to be only to Count 4, relating to a sale of 50 unregistered shares on July 23, 1957, and that "the Government will address itself to the remaining counts at the time of disposition." After further allocution, the judge authorized withdrawal of the not guilty plea on Count 4 and Doyle pleaded guilty on that count. The court asked "what comment does counsel care to make concerning a trial of the remaining counts of the indictment," the United States Attorney responded with the same formula as before, the court inquired whether this meant that "the Government contemplates a dismissal or nolle of the remaining counts," and the prosecutor answered "Yes."

On May 3, Doyle appeared for sentence. After extended argument by his attorneys, of which more hereafter, the judge sentenced him to pay a $5,000 fine and to be committed to the custody of the Attorney General for three years, with execution of the prison sentence to be suspended after three months. The Government then moved to dismiss the remaining counts, and this was granted. At his attorneys' request Doyle was given until May 24 to arrange his affairs. On May 12 he filed a notice of appeal to this court, and also moved in the district court for modification of his sentence. At a hearing on May 17, the judge denied motions for leave to see the probation report and for bail pending the appeal; the motion for modi-

fication of sentence was not pressed because of the appeal. Later this court denied a motion by the Government to dismiss the appeal as frivolous and granted bail, but set an expedited schedule for hearing.

The points sought to be raised on appeal, where still another attorney represented Doyle at argument, fall into two categories.[2] One concerns the delay in unsealing the indictment, under the not unrelated rubrics of the five-year statute of limitations, 18 U. S. C. § 3282, and the provisions of the Sixth Amendment and F. R. Cr. P. 48(b) as to speedy trial. The other goes to matters concerning sentence. We do not believe the substantive questions in the first category can be reached. And even if we were to make the assumption—in all likelihood unduly charitable—that the claims with respect to sentence, if established, would fall within the narrow range where a federal appellate court may direct resentence, see *United States v. Wiley*, 267 F. 2d 453 (7 Cir. 1959), we find not the slightest merit in those here asserted.

I.

The cases are legion that "a plea of guilty to an indictment is an admission of guilt and a waiver of all non-jurisdictional defects." *United States v. Spada*, 331 F. 2d 995, 996 (2 Cir.), cert. denied, 379 U. S. 865 (1964), and cases cited; *United States ex rel. Boucher v. Reincke*, 341 F. 2d 977, 980-81 (2 Cir. 1965). Although failure of the indictment to charge an offense may be treated as jurisdictional, *United States v. Cook*, 84 U. S. (17 Wall.) 168 (1872), held that an indictment states an offense even though the crime alleged appears to be barred by limita-

[2] We reject as not meriting discussion a claim that Count 4 did not charge an offense. See *McDaniel v. United States*, 343 F. 2d 785 (5 Cir. 1965).

tion. In *United States v. Parrino*, 203 F. 2d 284, 286-87 (2 Cir. 1953), this court, speaking through Judge Learned Hand, applied the *Cook* case so as to prevent relitigation of the issue of limitations after a plea of guilty. *Pate v. United States*, 297 F. 2d 166 (8 Cir.), cert. denied, 370 U. S. 928 (1962), followed the same rule with respect to a claim of denial of speedy trial in violation of the Sixth Amendment. We recognize that the Criminal Rules contemplate that the issue of speedy trial may be raised by pretrial motion, F. R. Cr. P. 48(b), and that a few courts have allowed limitations questions to be considered under Rule 12(b)(1) before trial, e.g., *United States v. Zavin*, 190 F. Supp. 393 (D. N. J. 1961). In our view, the effect of a plea of guilty does not depend on whether an issue sought to be pressed on appeal or in collateral attack might have been, or was in fact, properly raised in advance of trial. An unqualified plea of guilty, legitimately obtained and still in force, bars further consideration of all but the most fundamental premises for the conviction, of which the subject matter jurisdiction of the court is the familiar example. The claims here asserted have nothing of this quality.[3]

Appellant argues that this rule runs counter to sound

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[3] Although *United States v. Harris*, 133 F. Supp. 796 (W. D. Mo. 1955), aff'd on other grounds, 237 F. 2d 274 (8 Cir. 1956), would confine the rule that a plea of guilty eliminated the issue of limitations to cases where, as in *Parrino*, the prosecution might be able to bring itself within an exception to the statute, this appears inconsistent with the language in *United States v. Cook*, *supra*, 84 U. S. (17 Wall.) at 180, and with the thrust of Judge Hand's decision in *Parrino*. We also note that a variance between the pleaded date and the proof at trial is normally permitted for limitations purposes, unless actual prejudice would be worked upon the defendant. *United States v. Perlstein*, 126 F. 2d 789, 798 (3 Cir.), cert. denied, 316 U. S. 678 (1942); see *Ledbetter v. United States*, 170 U. S. 606, 612-13 (1898). In any event *Harris* cannot aid appellant since the indictment here was timely on its face.

principles of judicial administration since, if a defendant is willing to rely on his ability to convince an appellate court of the validity of his rejected claims as to delay, a trial on the merits ought not be required. The premise is sound enough but the conclusion does not follow. There are a number of ways to deal sensibly with such a case without departing from the principle of *Parrino*. A plea expressly reserving the point accepted by the court with the Government's consent[4] or a stipulation that the facts are as charged in the indictment are two; failing either of these, the defendant can simply stand on his not guilty plea and put the Government to its proof without developing a case of his own.

Doyle contends that however the matter might otherwise stand, a conclusion favorable to him is compelled by *Jaben v. United States*, where the Eighth Circuit permitted the defendant who had pleaded *nolo contendere* to assert on appeal a claim of limitations as to which the district court had denied a motion to dismiss, 333 F. 2d 535 (8 Cir. 1964), and the Supreme Court affirmed the conviction without discussion of the point, _____ U. S. _____ (1965); indeed, Doyle's appellate counsel urged in argument that the Government must have conceded this in the Supreme Court. The contention is rather swiftly answered by examination of the record—which was not brought to our attention by counsel for either side. For this shows that Jaben pleaded *nolo* on the express condition "that the defendant will then have an opportunity to have the question as to whether the said count is barred by the statute of limitations decided upon by the Eighth Circuit Court of Appeals

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[4] Although it is doubtful that the Government would agree to dismiss the remaining counts of a multi-count indictment after such a qualified plea to a single count, this only reinforces our conclusion, for reasons elaborated below.

or by the Supreme Court, and that the plea of *nolo contendere* is not to preclude the defendant from taking an appeal on the issue at that time." It is thus unnecessary to consider the other possible grounds of distinction which the Government needlessly urged.

Moreover, even if *Cook* and *Parrino* do not mean what we think they mean, we would nevertheless decline to consider Doyle's limitation and Sixth Amendment claims on the facts of this case. Even if such claims are not waived by pleas of guilty *simpliciter*, a defendant advised by counsel can agree so to waive them, and the circumstances compel the conclusion that Doyle did precisely that.

A few more facts round out the picture. On the day of sentence, Doyle's trial counsel began by recalling that "as you will know, there was plenty of activity before the accused entered a plea of guilty to the Fourth Count. And every effort was made to avoid any record, which resulted in this conviction. However, that is beside the point now; the matter has been disposed of, and he has a record of conviction on that Fourth Count." Counsel went on to explain that the indictment had "simmered down to one count * * * as a result of a statement, caused by a question propounded by your Honor to the District Attorney, as to what disposition would be made of the other counts. And it was agreed that they would be dismissed after this matter was disposed of." He reiterated "there was plenty of skirmishing before he entered his plea on the technical violation, and it is a conviction that will stand against him for the rest of his life." After telling the court about Doyle, the attorney continued, "The conviction itself is a sad thing for him. We tried every way, until finally he agreed to enter a plea, of his own free will and accord, to that Fourth Count, which will stand against him for the re-

mainder of his days." Counsel concluded by stating that he and other counsel had "tried to represent him [Doyle] to the best of our ability" and "We think this was the best disposition, to do what we did. We stand by it * * *."

The Government, and the judge, had every reason to consider that this presentation, taken in the light of all the circumstances, waived any right of appeal from the denial of the motions to dismiss on the score of the very issues stated to be "beside the point now." It is inconceivable that the Government would have moved for dismissal of nine counts of the indictment it had been pressing for trial, some of which related to crimes of a date later than Count 4, if it had any notion that Doyle would shortly be urging that the conviction, represented to the court as one "that will stand against him for the rest of his life," would stand only for a few months. The imposition of a prison sentence, short as it was, obviously came as a most unpleasant surprise to Doyle and his lawyers. Yet when counsel then requested that execution of sentence be stayed briefly, there was no suggestion of any appeal. Rather, when Judge Clarie asked the reason for a stay, counsel replied, "Well, your Honor, we have got to make some preparations. As you know, this man is involved in many things, and I think that is a fair request * * *." Although we could remand for the taking of evidence and for findings as to an agreement, we think the record speaks for itself so clearly that no further delay should be brooked.

In disposing of this branch of the case as we do, we would not wish to be understood as implying disagreement with the judge's denial of the motion to dismiss. Like him we find little attractiveness in Doyle's now seeking to take advantage of the failure of the Department of Justice, when yielding to his entreaties that it investigate his claims of immunity, to exact an express waiver which, as shown

by the subsequent conduct of his attorney, he would almost certainly have given. We simply do not reach the issue, for reasons here explained.

II.

The prison sentence of three years, with execution suspended after serving three months, and probation for a year must be conceded to be modest as compared with the five-year maximum allowed by 15 U. S. C. § 77x. Although Doyle's trial counsel chose to call the failure to register a "technical violation," counsel can hardly be unaware of the close connection between a wilful failure to register securities and their fraudulent sale, which this Court has often pointed out, *United States v. Crosby*, 294 F. 2d 928, 944-45 (2 Cir. 1961), cert. denied, 368 U. S. 984 (1962); *United States v. Benjamin*, 328 F. 2d 854, 864 (2 Cir.), cert. denied, 377 U. S. 953 (1964). The principal attack is that, before passing sentence, the court said, "Now counsel has well stated * * * that we are concerned directly with 50 shares of stock. But the Probation Officer's report also indicates that this failure to register permitted the sale to many thousands of persons, of several millions of shares—two and a half, I think, millions of shares of stock, without the registration statement having been filed." After sentence had been pronounced, trial counsel suggested there might be "some correction that could be made about those two and one half million shares" and sought an opportunity to talk to Doyle about that. Judge Clarie said that this "wouldn't have that much bearing on the matter," that it was inconsequential "whether it was one million, or half a million," that "It is not a question of 50 shares of stock alone that the Court has considered. The lack of registration is the important and paramount factor." When the point was again

pressed at the proceedings on May 17, the judge asked Doyle's New York attorney what he claimed was the correct figure of United States sales of unregistered shares for which Doyle was responsible. The attorney said his "only answer" was "that Mr. Doyle pleaded guilty to Count Four of the indictment, which charged him with fifty shares." The judge properly characterized this as evasive. The brief and argument for Doyle in this Court were no more informative.

Doyle's basic contentions respecting these events appear to be two: that the stock transactions covered by other counts of the indictment and beyond it should not have been considered; and that, in any event, the sentence rests on an inaccurate exaggeration of the scope of those activities.

On the first point, Doyle disclaims, as he must, any contention "that the court is strictly limited, in imposing sentence, to the framework of a count upon which a defendant is found guilty." What remains of the argument after the disclaimer is not clear. The narrowing of the indictment to a single count limits the maximum punishment the court can impose but not the scope of the court's consideration within the maximum. The dismissal of the other counts at the Government's request was not an adjudication against it on the merits, even though, as a result of the statute of limitations, no further prosecution can occur for the offenses there charged. The aim of the sentencing court is to acquire a thorough acquaintance with the character and history of the man before it. Its synopsis should include the unfavorable, as well as the favorable, data, and few things could be so relevant as other criminal activity of the defendant, particularly activity closely related to the crime at hand. Counsel suggests that although a "criminal record" may be con-

sidered, crimes not passed on by a court are beyond the pale, but we see nothing to warrant this distinction. *Williams v. New York*, 337 U. S. 241 (1949). Of necessity, much of the information garnered by the probation officer will be hearsay and will doubtless be discounted accordingly, but the very object of the process is scope and the defendant is always guarded by the statutory maximum. To argue that the presumption of innocence is affronted by considering unproved criminal activity is as implausible as taking the double jeopardy clause to bar reference to past convictions. See *Williams v. Oklahoma*, 358 U. S. 576 (1959). Indeed, Doyle's protests are almost ludicrous as applied to the present facts. The Government was ready to proceed on all the counts; simply by adhering to his former plea Doyle could have had a public trial where he could dispute all the Government's charges, and fully preserve the points dealt with in Part I of this opinion as well. It was he, on the advice of many highly sophisticated counsel, who avoided airing of the facts by a guilty plea.

Doyle's second criticism of the sentence, concerning an alleged error as to the number of shares sold, is equally without merit. We begin with grave doubts that the point deserves any consideration in view of the persistent failure of Doyle's attorneys to suggest another figure or even to explain precisely how the trial judge's figure is challenged; we cannot imagine that even a very sizable reduction from two and one half million would seriously alter a trial judge's picture of the distribution as a large scale enterprise. The silence on this score could well be the basis of inferring that Judge Clarie was not seriously mistaken and strongly suggests that any figure counsel could support would be sufficiently large that the differences would be of no consequence.

Even if Doyle could show that the judge was mistaken by several orders of magnitude, no grounds for reversal would exist. For the trial judge, while quite properly indicating that more was at stake than a sale of fifty shares of stock, expressly emphasized that no great weight was given to the particular number of shares and that failure to register was the significant consideration. Doyle was a business man of experience, dealing in stock of his own enterprise, and said to be fully familiar with the registration requirement; there is not the slightest reason to doubt that the trial judge meant what he said in specifying the basis for his sentence. To cite decisions like *Townsend v. Burke,* 334 U. S. 736 (1948), as requiring reversal is incongruous. There a defendant who neither received nor waived the assistance of counsel was given a substantial sentence after the trial judge recited and remarked on a record of past offenses, of which just under half turned out to be not convictions but acquittals. The principle stated by Mr. Justice Jackson was "that the disadvantage from absence of counsel, when aggravated by circumstances showing that it resulted in" actual disadvantage or prejudice violated due process, and the Justice emphasized how counsel might have redressed the false assumptions of the sentencing judge. Doyle was possessed of a large force of lawyers who were given ample opportunity to correct any misapprehension.

The judgment is affirmed. Since execution of this sentence has already been too long delayed, we direct that the mandate issue five days from the filing of this opinion.